

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	Criminal Action No.
v.	:	1:16-cr-10137-LTS-1
KENNETH BRISSETTE, et al.,	:	1:16-cr-10137-LTS-2
Defendants.	:	

BEFORE THE HONORABLE LEO T. SOROKIN, DISTRICT JUDGE

**MOTION HEARING
SEALED**

Monday, July 15, 2019
1:57 p.m.

John J. Moakley United States Courthouse
Courtroom No. 13
One Courthouse Way
Boston, Massachusetts

Rachel M. Lopez, CRR
Official Court Reporter
One Courthouse Way, Suite 5209
Boston, Massachusetts 02210
raeufp@gmail.com

APPPEARANCES

On behalf of the Plaintiff:

UNITED STATES ATTORNEY'S OFFICE - MASSACHUSETTS
BY: LAURA KAPLAN AND KRISTINA E. BARCLAY
John Joseph Moakley Courthouse
One Courthouse Way, Suite 9200
Boston, Massachusetts 02210
(617) 748-3124
laura.kaplan@usdoj.gov
kristina.barclay@usdoj.gov

On behalf of Defendant Brissette:

HOGAN LOVELLS US, LLP
BY: WILLIAM H. KETTLEWELL AND SARA E. SILVA
100 High Street
20th Floor
Boston, Massachusetts 02110
(617) 371-1037
bill.kettlewell@hoganlovells.com
sara.silva@hoganlovells.com

On behalf of Defendant Sullivan:

COSGROVE, EISENBERG & KILEY, PC
BY: THOMAS R. KILEY, WILLIAM J. CINTOLO,
AND MEREDITH G. FIERRO
One International Place
Suite 1820
Boston, Massachusetts 02110
(617) 439-7775
tkiley@ceklaw.net
wcintolo@ceklaw.net
mfierro@ceklaw.net

A P P E A R A N C E S, C O N T.

On behalf of Defendant Sullivan:

ACUCITY LAW, LLC
BY: JAMES KELLEY
One International Place
Suite 1400
Boston, Massachusetts 02110
(617) 702-4000
jkelley@acucity.com

PROCEEDINGS

(In open court.)

THE DEPUTY CLERK: The United States District Court for the District of Massachusetts is now in session, the Honorable Leo T. Sorokin presiding.

MS. BARCLAY: Good afternoon, Your Honor, Kristina
Barclay for the United States.

MS. KAPLAN: Good afternoon, Laura Kaplan for the Government.

THE COURT: Good afternoon.

MR. KETTLEWELL: Good afternoon, Your Honor, William Kettlewell for Mr. Brissette, together with my partner Sara Silva.

MS. SILVA: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. KILEY: Good afternoon, Your Honor, Thomas Kiley with Meredith Fierro, Bill Cintolo, and Mr. Kelley, James Kelly, for Mr. Sullivan.

THE COURT: Okay. Good afternoon.

So I thought there were a couple of things to go over. I thought, first, I would just hear you a little bit on the different pending motions, and then we can talk about jury selection and the like, but I've read all of the papers, so I don't need a lot on that, unless there's something that you want to add that's not in the papers.

1 I'll tell you, as a general matter, on the motions
2 in limine, a lot of those seem like trial questions rather
3 than resolution now, but I hear you, if there's -- if you
4 want to be heard.

5 MR. KILEY: I think we do want to be heard on
6 those.

7 THE COURT: All right.

8 MR. KILEY: And I do think with what we'd like to
9 lead with is Ms. Fierro arguing the renewed motions to
10 dismiss and then get straight to the motions in limine.

11 THE COURT: Okay. Go ahead.

12 MS. FIERRO: Thank you, Your Honor. We think that
13 reconsideration is appropriate in light of part 5 of the
14 First Circuit decision in this case. Now, both the
15 defendants and Your Honor have previously expressed concerns
16 about the reach of the Government's theory, particularly as
17 it applies to public officials.

18 Now, though the First Circuit disagreed with us on
19 the meaning of obtaining, it indicated that we weren't off
20 base in questioning the reach of the Government's theory, but
21 that we were simply focused on the wrong element.

22 Now, of course, we all know that the issue of
23 wrongfulness was not presented in the case before the First
24 Circuit, but they didn't simply drop a footnote saying that
25 they were declining to reach the issue. Instead, they

1 dedicated an entire section to the discussion of
2 wrongfulness, and I want to particularly turn the Court to
3 the final page of the First Circuit's decision, which I think
4 is really what gives us grounds for pretrial dismissal now.

5 THE COURT: Go ahead.

6 MS. FIERRO: The defendants have been charged with
7 threatening fear of economic harm, a type of fear we have
8 explained that is not necessarily wrongful for Hobbs Act
9 purposes. In fact, just as fear of economic harm is part of
10 many legitimate business transactions, fear of economic harm
11 may also be a necessary consequence of many legitimate
12 exercises of official authority.

13 Now, I think that this sentence is important,
14 because it indicates that it's not necessarily or inherently
15 wrongful for public officials to use economic fear. Instead,
16 it may be a necessary consequence of a legitimate exercise of
17 an official's authority, and that seems to be contrary to
18 what, at times, the Government has been suggesting in this
19 case.

20 Second, the First Circuit says, "In the end,
21 whether the use of economic fear is wrongful within the
22 meaning of the Hobbs Act extortion provision, turns, at least
23 in part, on whether it was employed to achieve a wrongful
24 purpose."

25 And again, this is important because the defendants

1 have always maintained that the Government must prove both
2 wrongful ends and wrongful means, but in particular, wrongful
3 ends is the most important element, given that this is a fear
4 of economic harm case.

5 So then the question becomes, what was the
6 defendants' purpose under the indictment? And the First
7 Circuit answers this question. The First Circuit says, "The
8 conduct that is alleged in the indictment here concerned the
9 use of economic fear by Government officials to secure real
10 work for members of a specific union and for which the
11 officials would receive no personal gain."

12 So the defendants' purpose under the indictment,
13 that's an uncontested fact, that they were looking for real
14 jobs for members of the union. That's taken straight from
15 the First Circuit's decision, which was taken from
16 representations that the Government has made to the Court.

17 Now, of course, the test for wrongful ends is
18 whether the person who obtained the property obtained it
19 without a claim of right to it. Here, the property that's
20 alleged in the indictment is wages. And the person who
21 obtained it, the union workers, obtained it in return for
22 real work and real services that they provide to Crash Line.
23 So it seems obvious that someone who got paid wages in return
24 for work that they actually provided, that they had a claim
25 of right to those wages and so I think that dismissal is

1 appropriate just under that ground of wrongful ends.

2 Now, I also want to just address a few points in
3 the Government's opposition. Let me just take that out.

4 So the Government's opposition mostly focuses on
5 wrongful means and they seem to indicate that wrongful ends
6 is not necessarily something that needs to be proven here.
7 And so I'll just start with -- hold on. Let me get to the
8 right page. Page 5.

9 The Government says, "The defendants' conduct in
10 this case was wrongful, because defendants had no claim of
11 right" -- and I'll just stop there.

12 Of course, the test for wrongful means is whether
13 the person who obtained the property obtained it without a
14 claim of right to it. Here, the Government's proceeding on a
15 third party theory of obtaining and so the relevant person
16 who you would ask, if they had a claim of right to the
17 property, is a person who obtained it.

18 Now, the Government is proceeding under a wrongful
19 means theory, based on a test that has been cited in some
20 civil RICO cases and that's whether the plaintiff, or here it
21 would be the victim, had a preexisting right to be free from
22 the defendants' demand. That question looks at whether the
23 victim has a preexisting right, not whether defendants had a
24 claim of right to demand it. I'll continue.

25 The Government says that the defendants didn't have

1 a claim of right to bargain with Crash Line, absent such a
2 requirement in Crash Line's licensing agreement. As we said
3 in our reply, the absence of a requirement does not mean --
4 does not equal a prohibition.

5 Second, and this is something that I know has been
6 briefed before the Court many times and that the Court is
7 familiar with, that absent the City's proprietary authority,
8 pursuant to the *Boston Harbor* case, that we had no right to
9 make the demand.

10 I would just contend that it's a problem for the
11 Government to rely on applying the market exception within
12 machinists -- I'm sorry, machinists preemption. The
13 Government is relying on machinists preemption to say that
14 it's wrongful. And of course, we contend that these
15 Government officials do have a right to impose the union
16 requirement, under the market participant exception to
17 machinists preemption, and that is something that comes right
18 from the *Boston Harbor* case.

19 But unfortunately, and this is discussed in many
20 law review articles, the *Boston Harbor* case isn't exactly the
21 model of clarity for applying that test and for what makes
22 someone a market participant. And so courts -- there's been
23 a wide variety of ways that courts have had held that that
24 test should be applied and general courts have been confused
25 about how to apply the market participant exception. So to

1 say that if courts are having trouble applying this, I think
2 it's problematic to then say that if defendants don't
3 necessarily understand the difference from when they're
4 acting as a market participant and when it's someone's
5 regulatory authority, that then if they get that wrong, that
6 that's suddenly wrongful and it's a crime, that that raises
7 some due process concerns.

8 And actually, if you'll look at the bottom of
9 page 5 here, there's the footnote. The Government says that
10 one of the reasons that proprietary authority that the market
11 participant exception doesn't apply is because the use of
12 Local 11 was defendants' brain child and not the result of
13 any authority that they got from the city, that they didn't
14 have authority from higher-ups to do this, but I would just
15 suggest to the Court that that argument goes both ways. If
16 the Government can't -- if the defendants can't have --
17 impose this requirement because they didn't have a
18 proprietary authority, then how is it that they had authority
19 to issue a regulation on behalf of the City.

20 The Government's third point is that the defendants
21 had no right to make this -- this conduct is wrongful,
22 rather, because they didn't have support of a majority of
23 existing nonunion employees as described in *A. Terzi*.

24 Of course, in this case, the defendants -- there
25 was no demand for Crash Line to sign a collective bargaining

1 agreement. The demand was that Crash Line would hire a few
2 union members and so I don't think that you need a majority
3 of existing nonunion employees to say that that's okay, in
4 order to hire a few union members. And again, and that case
5 just has no relevance to us whatsoever, because first, it was
6 about a demand to sign a collective bargaining agreement.
7 And second, it was a force case. The facts are actually very
8 similar to the facts of the Steel & Rye incident in *Top Chef*,
9 because that case involved there -- a production company was
10 putting on a televised fashion show and Local 1 was upset
11 that they were nonunion, so they came to the fashion show,
12 they blocked the entrances and exits, they were verbally
13 assaulting the production crew, making racist remarks. So,
14 again, that really has nothing to do with this case.

15 If you'll turn to page 9, the other reason that the
16 Government says that defendants' conduct was wrongful was
17 because the conduct before this Court involves public
18 officials putting pressure on an employer through threats of
19 economic harm, aimed at coercing the employer into entering
20 an agreement to hire members of a labor union. That is
21 extortion.

22 Well, what that sentence leaves out, of course, is
23 the crucial element of wrongfulness, so they seem to suggest
24 that just by public officials using economic fear that that's
25 necessarily wrongful, or that by someone putting on --

1 pressuring an employer to hire a particular person, that
2 that's inherently wrongful, and there's really no support for
3 that proposition.

4 At the bottom of page 9, another alternate theory
5 of many theories given here of why the defendants' conduct
6 was wrongful, wrongful means, is because it violated the
7 state ethics law. Now, of course, this has never been
8 mentioned, since the defendants were indicted three years
9 ago. I believe this is the first time that the Government
10 has cited the state ethics law as a reason for why the
11 defendants' conduct was wrongful, and of course, wrongful is
12 really one of the most important elements of why the
13 defendants' conduct was extortion, so it seems like the
14 Government's just roaming at large here, trying to find a
15 violation.

16 But in any case, the state ethics law, first of
17 all, requires that the defendants' conduct was unwarranted,
18 an unwarranted privilege. So I won't totally go into it, but
19 we would make the argument that the defendants' conduct here,
20 that there was some justification for it, justification for
21 asking Crash Line to hire some members of the union, given
22 the circumstances where there was going to be a giant wrap
23 blown up at City Hall Plaza, where everyone was drinking
24 during Boston Calling.

25 But more importantly than that 23(b) (2) under

1 Chapter 268A, which is the provision that the Government is
2 relying on here, what that does is it prohibits officials
3 from using their official position to gain an unwarranted
4 privilege for themselves or others. Now, that sounds a lot
5 like extortion under the color of official right. And so it
6 seems like the Government is trying to charge us with
7 wrongful use of economic harm, but then rely on the state
8 ethics law in order to get around the requirement in
9 extortion under color of official right, which would require
10 them to prove a *quid pro quo*. They're trying to basically
11 back-door in conduct that the Supreme Court threw out in
12 *McCormick*.

13 Now, I'll just finally say that on our argument on
14 wrongful ends, that pretrial dismissal is appropriate at this
15 stage, because there's no wrongful ends. I recognize that
16 the Government has objected to this procedure and that one of
17 the factors the Court has looked to in deciding whether to
18 resolve a pretrial motion to dismiss based on legal
19 insufficiency, is whether the Government has objected. But
20 here, I can't understand the basis for the objection, at
21 least on a wrongful ends argument, because that turns on sole
22 being uncontested facts, that the defendants' purpose was to
23 get jobs for members of a labor union, real jobs that they
24 would work for. And so I don't see what's gained by going
25 through a two-week trial, if you agreed with our argument on

1 wrongful ends, for you then to throw the Government's case
2 out on a Rule 29 motion.

3 And of course, as the solicitor general himself has
4 said, people who are indicted on incorrect legal theories are
5 innocent people. And so if the Government agrees with us
6 that wrongful ends is necessary to support the Government's
7 case and there's no wrongful ends here, and the Court
8 therefore dismisses the indictment at this stage, the Court
9 will have saved the defendants from trying innocent people.
10 Thank you.

11 THE COURT: Thank you.

12 Ms. Silva or Mr. Kettlewell, do you want to add
13 anything to that?

14 MS. SILVA: Just very briefly, Your Honor.

15 Ms. Fierro certainly covered our arguments
16 extremely well. Just to focus on one issue, which is this
17 motion of the overlap between use of -- wrongful use of fear
18 of economic harm and under color of official right. It
19 seems, from the Government's most recent pleadings, and also
20 from their proposed jury instruction, that what the
21 Government is seeking to do is to supply a missing fact
22 element, when that is a threat, with the fact that the
23 defendants worked for the City when they met with the
24 putative victims' representatives.

25 And specifically, Your Honor, there's clearly no

1 express threat. There's not one alleged. There's not an
2 implied threat alleged by any word or action of the
3 defendants themselves. What is apparently alleged, according
4 to the Government's pleadings, is that the defendants were --
5 had an official position at the time that they met with the
6 putative victim. And we submit, Your Honor, that using the
7 official position language necessarily requires the
8 Government to also plead and prove all of the elements of an
9 under color of official right case that have been developed
10 by the Supreme Court specifically to protect against a
11 constitutional problem.

12 And that problem is where is the line between
13 perfectly legitimate public official conduct and Hobbs Act
14 extortion. The line is clear, it is with payment and a *quid*
15 *pro quo* to do an official act. The Government has
16 represented over and over to this Court that it doesn't
17 allege that, it can't allege that, and so on that basis
18 alone, Your Honor, we submit that either the Government has
19 to prove, allege and prove, that the defendants themselves
20 said or did something, or if the Government wants to rely on
21 their employment status, then they need to prove a payment, a
22 *quid pro quo*, and an official act. Thank you.

23 THE COURT: Okay.

24 Anything you want to say, Ms. Kaplan?

25 MS. KAPLAN: Yes, Your Honor. First of all, I just

1 want to address this last point that Ms. Silva made, because
2 I wasn't planning on it, but I don't see a single citation
3 for this theory that because the defendants are public
4 officials and the Government has alleged as much in the
5 indictment, that there's any requirement that the defendants
6 be charged under a color of official right theory, and that
7 the Government prove a *quid pro quo*. There's no citation for
8 it, because that's just simply not the law.

9 Your Honor, this is the third time that this Court
10 is hearing argument on a motion to dismiss based on
11 wrongfulness. It's the third time that the defendants have
12 argued that the Government cannot prove wrongfulness and
13 there's absolutely nothing new, since the last time we argued
14 these motions. And for that reason, the defendants' motion
15 should be denied. There is nothing in the First Circuit's
16 decision in the *Brissette* case that requires dismissal. The
17 decision dealt solely with the issue of obtaining property.
18 The last few pages of the opinion, which discussed the case
19 in wrongfulness, is not a holding, nor did the First Circuit
20 have the benefit of a full record on which to rule on the
21 issue of wrongfulness.

22 The indictment currently before the Court tracks
23 the elements of Hobbs Act extortion. It uses the statutory
24 language to describe the offense and it informs the
25 defendants of the specific offenses with which they're

1 charged. So on the four corners of the indictment, dismissal
2 is not an appropriate remedy, yet I believe as Your Honor
3 alluded to, the defendants are, once again, before the Court,
4 asking you to rely on contested and disputed facts to dismiss
5 the indictment, which is completely inappropriate.

6 On the issue of wrongfulness, the defendants make
7 two arguments. The first is that even if the defendants used
8 fear of economic harm to obtain wages and benefits for the
9 union, it was not for a wrongful purpose. The second
10 argument is that Crash Line's desire to obtain a future
11 arrangement for the use of City Hall Plaza does not give rise
12 to a cognizable fear of economic harm.

13 The Government agrees that the Government must
14 prove that the defendants used fear of economic harm for a
15 wrongful purpose, for which the First Circuit has defined as
16 a threat made where the extortionist has no lawful claim or
17 right to the property commanded. And that's the Cotter case.
18 And I believe the district court in the Cotter case gave just
19 such an instruction.

20 There are several things about the defendants'
21 conduct which make it wrongful. And because we have multiple
22 theories does not mean that the theories have changed. It's
23 just that there are multiple things that were wrong with what
24 the defendants did.

25 Generally speaking, what makes the conduct of the

1 defendants' wrongful is that they had no claim of right to
2 the wages and benefits or a contract for union labor and they
3 exploited the victim's fear of economic harm to obtain that
4 property. As to the defendants' first argument where they
5 claim that the defendants' purpose was not wrongful, the law
6 is not as settled as the defendants would have you believe.
7 The Government is not required to prove that both the means
8 and the ends were wrongful and nothing in *Burhoe* or *Brissette*
9 has changed that. In fact, the First Circuit in *Cotter* and
10 *Sturm* made clear that the Government was not required to
11 prove both wrongful means and ends, that wrongful ends was
12 enough.

13 In *Sturm*, the Court said that it might very well be
14 possible that an economic threat may be wrongful, even if
15 made to achieve legitimate ends. And in *Cotter*, the Court
16 said we don't mean to suggest that no economic threat is
17 wrongful where there exists a legal right to the property
18 obtained. So in other words, an economic threat can be
19 wrongful, regardless of the ends, and there's no requirement
20 that both the means and the ends be wrongful.

21 In any event, defendants' conduct was wrongful,
22 because the defendants simply were not entitled to the
23 property and they knew it. And there were several ways the
24 Government can show this. The evidence will show that the
25 defendants had no right to withhold permits or to effect the

1 terms of the permits or the entertainment license, based on
2 whether Crash Line used nonunion labor, and they knew it. It
3 was wrongful because there was a licensing agreement between
4 Crash Line and the City, which did not require the victim to
5 use union labor. And in fact, it provided that they could
6 choose labor of their own. And even the RFPs, which were
7 issued by the City, did not call for the applicants to use
8 union labor, and the defendants knew this, as well.

9 And it was wrongful, because there is a state law,
10 Mass. General Law 268(a), which prohibits defendants from
11 using their official position to help the union obtain these
12 jobs in a contract, and any requirement to use union labor
13 would be discriminatory regulation. And the evidence will
14 show that the defendants knew that, as well. And the fact
15 that this may be the first time the Government is arguing it
16 is irrelevant to a motion to dismiss the indictment, where
17 the Government is not required to put its theory of the case.

18 Another way the Government can prove defendants'
19 conduct was wrongful was because the victims had a
20 preexisting right to be free from this type of interference
21 or economic harm, whether it be because of the licensing
22 agreement, or the Mass. General Law, or the National Labor
23 Relations Act, which prohibits this type of interference.
24 This is an area where the defendants were not -- where they
25 were regulators, they were not proprietors, and they were not

1 free to wade into whether an employer enters into an
2 agreement with the union. That's an issue that the parties
3 are entitled to resolve without interference. That's what's
4 contemplated by the NLRA. These defendants were public
5 officials and they cannot interfere with or require private
6 individuals or a business to enter into an agreement with the
7 union.

8 And on that note, just so there's no
9 misunderstanding, because I think you mentioned something the
10 other day about picketing. And I just want to say that while
11 threatening to picket is generally permissible, unions can
12 leaflet, they can ask for, and they can say they're going to
13 picket, but threats to picket for the purpose of coercing a
14 private employer to reassign work from a nonunion company to
15 a union company is not permissible under the NLRA.

16 As for the defendants' second argument that the
17 victim's fear that their license would not be extended, not
18 giving rise to a fear of economic harm, they are simply
19 wrong. The evidence will establish beyond a reasonable doubt
20 that the victim needed certainty about future events, event
21 dates to satisfy their investors, and to book talent.
22 Without this, they couldn't operate in the future, and they
23 would suffer significant economic harm. There's no question
24 that the -- Crash Line had their dates through 2017, but
25 there's also no question that they were looking for and they

1 were negotiating whether, through an extension of their lease
2 or through the RFP, dates through 2020.

3 It was not just the victim's fear of not obtaining
4 the extension of the licensing agreement or the RFP, it was
5 also the fear that if they did not agree to hire members of
6 IATSE, they would be issued permits for severe restrictions
7 for their operations and the sale of alcohol.

8 Their fear was also that they would not get their
9 entertainment license in time to open the gates for the
10 festival, which was three days away, and for which tickets
11 had been sold. Their fear was also that they would not have
12 the dates extended through 2020, through either the licensing
13 agreement or the RFP. And none of these fears or concerns on
14 their part are mutually exclusive. They all are part of what
15 went into the decision by Crash Line to give into the
16 defendants' demands, their 11th hour demands, that they hire
17 members of the union. We haven't changed our theory of the
18 case. All of these fears contributed to the victim's
19 decision to hire IATSE and enter into a contract with them,
20 and they do give rise to fear of economic harm.

21 Your Honor, the First Circuit in the United States
22 versus Dedona, held that in the last analysis, it was for the
23 jury to say, in that case, whether the defendant was seeking
24 a payment for his silence, as the Government contended, or a
25 payment for his services, as the defendants contended. And

1 the First Circuit in the *United States v. Olbres* also
2 explained that a jury is free to choose among alternative
3 interpretations of the evidence, so long as the jury's choice
4 is reasonable.

5 I think, if nothing else, Your Honor, these
6 arguments highlight that there are legitimate questions of
7 fact in this case, just as you said when we started today and
8 not just legal questions. These are questions which the
9 Government is entitled to have a jury decide. We've made all
10 of these arguments in our first opposition to the defendants'
11 motion to dismiss and the Court denied this very same motion,
12 with the same arguments, and that was on May 2, 2017, in
13 which you held that "The allegations in the indictment simply
14 do not permit the Court to decide this motion now, its
15 resolution will depend on the evidence offered at trial and
16 this is a question properly reserved for the jury. There is
17 nothing new now to warrant dismissal."

18 The indictment adequately apprises the defendants
19 of the charges against them, coupled with the voluminous
20 discovery, and these multiple arguments at these hearings.
21 They know the Government's case and they are well armed to
22 try it. And we, therefore, ask the Court to deny the
23 defendants' motion to dismiss.

24 THE COURT: Thank you.

25 MR. KILEY: I'm not getting up to rebut, Your

1 Honor, when I started to rise.

2 THE COURT: Okay.

3 MR. KILEY: I was going to move to a motion in
4 limine.

5 THE COURT: Yes. That would be fine.

6 MR. KILEY: I think that's an appropriate segue.
7 And it is the motion in limine with respect to the licensing
8 agreement. And with respect to that particular motion, it
9 has morphed, I think -- the position that we take has morphed
10 over time as we think the Government's theories have morphed
11 over the course of time.

12 In our original motion to -- which was filed and
13 pending at the time that you dismissed the case, it had been
14 filed, the request was that you exclude evidence concerning
15 the licensing agreements. And we didn't properly, at that
16 point in my mind, label it as the irrevocable licensing
17 agreement, because we thought we were only talking about one
18 thing, which was that irrevocable license agreement. That is
19 a document.

20 It is a document that, in reality, will be
21 discussed in the case. The argument that we were advancing
22 was one that had a vocabulary issue, in part, but more
23 importantly, it dealt with, as has been argued here and what
24 the segue is, is to the notion of wrongfulness.

25 One -- the third superseding indictment, in

1 paragraph 16, tells you that -- essentially, on
2 September 2nd, while these individuals -- and I shouldn't say
3 it. It says between July and September, while Crash Line
4 Productions was awaiting certain permits and approvals and an
5 extension of its license agreement, the reality that we
6 addressed in the motion in limine was there was no question
7 about an extension of its license agreement. They already
8 had everything that they could get under that license
9 agreement and had had it since March of the -- of 2013.

10 The comeback was, well, everybody knows that they
11 had everything they could get under that particular document,
12 but we're using the phrase "generically," as people in City
13 Hall did, as people on the Crash Line sides did, and
14 everybody knew that there was a desire, that they wanted a --
15 permission to operate after the year -- after the five-year
16 period was up.

17 THE COURT: After 2017.

18 MR. KILEY: After 2017. They wanted something --
19 they wanted to be able to operate. And what you -- what we
20 know from the pleadings that have been filed is what they
21 wanted wasn't an extension of the license agreement, the
22 irrevocable licensing agreement and the terms that were in
23 it. They wanted something else instead. And what they
24 wanted instead was a five -- they ask, as described in the
25 Government's papers, was a five-year exclusive, within a ten

1 mile radius, of ticket and events. And Your Honor, in terms
2 of whether that distinction makes a difference, with respect
3 to the element of wrongfulness that we have been talking
4 about earlier today, it makes a world of difference, because
5 every entrepreneur in every business dealing that ever occurs
6 has a desire to get something. That is -- that desire to get
7 something isn't a -- is not a fear of economic loss, it is a
8 desire for a particular process.

9 And yes, a threat or violence with respect to such
10 a thing can constitute Hobbs Act extortion, but in this case,
11 we got no threats, we got no violence. Instead what we got
12 is this novel theory, a novel application of the case law to
13 a fact pattern that is based upon a desire for something in
14 the future and that's what animates the motion in limine now.
15 It is the difference between the two. We're not -- I'm not
16 standing here today asking you to ban all evidence with
17 respect to the irrevocable license agreement.

18 THE COURT: What are you asking?

19 MR. KILEY: I'm asking you to not permit the
20 Government to merge two distinct things under this generic
21 term. When we're dealing with the irrevocable license
22 agreement and the Government wants to tell you it contains a
23 right for them to determine entirely who they're going to use
24 in terms of labor. Well, I'll be asking you to look through
25 the document for that, but that isn't controlling -- whatever

1 would be in that document isn't controlling with respect to
2 whether they have, in a future document, that would embody
3 the things that they are asking for, or want to ask for, in
4 September of 2014. They're two entirely different things.

5 So precision, precision in vocabulary, and not
6 merging, as they merge in the third superseding indictment,
7 the references to Brissette and Sullivan. They -- in other
8 words, as they refer to it, as you're going to hear with
9 respect to the City Hall motion in limine. The use of
10 generic terms in this case to things that are very specific
11 is very harmful and prejudicial to the defendants. And so
12 our motion asks you to limit -- what we want you to do now is
13 to prevent the conflation, if you deny the motion to dismiss,
14 and we proceed to trial as scheduled next week.

15 Again, my reference is to paragraph 16 in the third
16 superseding indictment, between July and September 2014,
17 while company A was awaiting the issuance of certain permits
18 and approvals from the City of Boston required for the
19 September 2014 music festival, as well as an extension of its
20 licensing agreement.

21 The irrevocable licensing agreement is attachment 1
22 to our original motion -- memorandum in support of that
23 motion to dismiss. It's Document 188-1. With respect to the
24 rights of Crash Line, there is a section, it's section 4, I
25 believe. It is 4 that deals with the licensee's

1 responsibilities. I think that's where you're going to find
2 that the Government is looking to find reference to rights,
3 as opposed to responsibilities. And the provisions that deal
4 with extension of license, extension of this agreement, this
5 irrevocable license agreement, are on page two through the
6 bottom of the page, when you get a chance to read it. So
7 that's what we're asking for on this motion in limine, as
8 things have changed, as this case has changed.

9 THE COURT: So you're not asking me to exclude any
10 evidence right now. You're just asking me to ensure
11 precision in the -- or difference between the license
12 agreement and the hope for, if you will, extension in --

13 MR. KILEY: Let me try to clarify. I am not asking
14 you to exclude evidence and testimony about the irrevocable
15 license agreement, Capital I --

16 THE COURT: Yeah.

17 MR. KILEY: I am asking you and I think you should
18 exclude evidence as to something other than what is charged
19 in paragraph 16 of the third superseding indictment and that
20 would be a reference to some other agreement, down the line,
21 that they knew also, unequivocally, undisputed, they already
22 knew they were not going to get as an extension, a simple
23 extension, without going through the RFP process, prior to
24 September 2, 2014.

25 So I think what is happening is we keep injecting

1 new things in what Your Honor and the First Circuit have
2 looked at as a case about whether permits and approvals were
3 needed to conduct the September 2014 festival. That thing,
4 that noncompetitive, exclusive arrangement that they were
5 seeking to get without going through an RFP process that
6 existed, it should not be admitted in the case. That's my
7 point.

8 THE COURT: Okay.

9 MS. BARCLAY: Okay. Thank you, Your Honor. I
10 think part of the problem here is that Defendant Brissette
11 used the term "extension of the license agreement"
12 interchangeably with a "new license agreement." This is
13 laymen talking about whether they're going to be able to have
14 security for concerts on City Hall Plaza for '18, '19, '20,
15 and beyond. Right?

16 So they're talking about it in terms of, you know,
17 we have an agreement until '17. We need an extension of that
18 agreement. It's not technically a legal extension of that
19 agreement, if they have to go through the RFP process, but
20 even that's not entirely clear. There's definitely a meeting
21 on July 31st, where the City officials say you're going to
22 have to go through the RFP process, but at that same meeting
23 Ken Brissette says, you know, I'm on the committee, and
24 essentially, there are some subjective factors here. So they
25 have this -- it's the fear, the victim's fear, that they're

1 not going to be able to get those dates, whether it's called
2 an extension of the irrevocable license agreement that's in
3 place, or whether it's a new irrevocable license agreement.
4 Again, it's a distinction without a difference, and the
5 pleading, the paragraph 16, is generic enough to encompass
6 both. And that's what the intent of the indictment was.

7 It's not to say that necessarily they believe they
8 were entitled to get three more years in that piece of paper
9 that the defendants have referenced and attached to their
10 motion. So the evidence regarding Crash Line's need for a
11 long term license agreement to use City Hall Plaza for
12 concerts beyond 2019, that's crucial proof of the victim's
13 fear of economic harm and the defendants' wrongful
14 exploitation of that fear, in order to force Crash Line to
15 hire IATSE workers for the September 2014 concert.

16 The evidence regarding the license agreement, it's
17 highly relevant evidence that both the threat of economic
18 harm inherent in the defendants' crunch time demand that
19 Crash Line used Local 11 for that concert and the victim's
20 fear of economic harm if they did not accede to the
21 defendants' demands.

22 Just in terms of the issue of wrongfulness, I think
23 it bears looking at *Rivera Rangel*, which is the First Circuit
24 case on this point. The Government will prove what the law
25 requires, that the victim believed that economic loss would

1 result from its failure to comply with the defendants' terms,
2 and that the circumstances rendered that fear reasonable.

3 We're mindful that we must demonstrate that the
4 loss feared must be a particular economic loss, not merely
5 loss of a potential benefit, but that doesn't mean that we
6 have to prove that the victims were entitled to a license
7 agreement beyond 2017. It's the possibility of lost business
8 opportunities to Crash Line, should the defendants not give
9 them a fair opportunity to obtain a long-term license
10 agreement that falls within the heartland of the fear
11 economic loss required under the Hobbs Act.

12 Whether the victims' ability to use City Hall Plaza
13 was accomplished by a license extension or by submitting a
14 response to the RFP, which they did do in 2015, twice, it's
15 irrelevant. And any prejudice caused by introduction of the
16 licensing agreement is far outweighed by the probative value
17 of the evidence to the victims' state of mind when they're
18 sitting in Ken Brissette's office on September 2, 2014.

19 THE COURT: Okay.

20 MR. CINTOLO: Your Honor.

21 MR. KILEY: Your Honor, one quickie.

22 THE COURT: Yes.

23 MR. KILEY: *Rivera Rangel*, I'd like you to look at
24 it. I'd like you to look at the passage that is on page --
25 oh, it's under head notes 10 and 11, and I'll quote. They're

1 describing a situation in which Ventura was merely attempting
2 to obtain preferential access, thought that even without the
3 payments, he would have a fair opportunity to obtain permits.

4 Your Honor, fear is not the same as a desire for
5 preferential treatment. We have statutory systems in place
6 in Massachusetts on procurements that include places like
7 City Hall Plaza, that require open, fair, competitive
8 processes. And what was being sought in July, on July 31st,
9 was something different. It was preferential treatment, not
10 unlike the preferential treatment that they obtained in 2012.
11 Thank you for allowing me that.

12 MR. KETTLEWELL: Judge, this is like the democratic
13 debate. So when Ken Brissette's name was mentioned, I'd like
14 just a minute to deal with that and it's this. The
15 indictment in paragraph 16 says "awaiting an extension of the
16 licensing agreement."

17 When you read the two exhibits, one and two, to
18 that motion, it's the licensing agreement and the only
19 extension they could get and the documents are clear. It
20 cannot be extended. It has to be done by RF P.

21 With respect to Mr. Brissette's so-called using
22 different words, well, there's going to be evidence in the
23 case about that. And here's what the putative victim wrote
24 on July 31st after meeting with Mr. Brissette and Ms. Cusick
25 about this licensing agreement.

1 "Carol and I just met with Ken Brissette (the new
2 Chris Cook) -- by the way it was the day he met him. The
3 first day he met him. "And Marybeth Cusick from City Hall.
4 At this moment, we are unable to extend our current lease
5 agreement. What we are able to do is change some dates."

6 And I won't read about the exchange of dates to
7 waste -- so I don't waste time.

8 "In January of 2015, they are going to issue a new
9 RFP for dates and events on the plaza. At that moment, we
10 will be able to submit and secure our festival dates."

11 So it's no question that agreement can't be
12 extended. They're not awaiting an extension in September.
13 They know in July 31st, they can't get it extended, and
14 that's as simple as it is.

15 That's all I have to say about it.

16 THE COURT: Okay.

17 MS. BARCLAY: Okay. If I could just one quick
18 thing, Your Honor. The desire for preferential treatment.
19 Again, these are all fact questions, right? And so this is
20 a -- something that's entirely appropriate for a closing
21 argument, but at this point, not appropriate for exclusion of
22 evidence before the trial even starts.

23 THE COURT: Okay. Next motion.

24 MR. KETTLEWELL: The next two are quick ones, Your
25 Honor. They're mine. The first relates to the motion

1 regarding reference to City Hall. And I understand we're not
2 going to get through the trial without referring to City
3 Hall, but what I am seeking is some clarity in connection
4 with what the Government is saying and who they're saying and
5 who their witnesses are saying did something to them. And
6 while I thought at the outset, this would be kind of a
7 simple, straightforward motion, I got the Government's
8 response, and they do exactly what I fear they're going to do
9 at the trial. As part of what the Government said in their
10 opposition of this motion, they said, in fact, when asked
11 how -- this is the victim, felt about the September 2, 2014
12 meeting in which the defendants demanded that Crash Line hire
13 IATSE workers for the imminent concert, Appel told
14 investigators, these guys are my landlords and he believed
15 Brissette and Sullivan could have issued the permits with
16 reduced times that would ultimately lead to the demise of
17 Boston Calling.

18 Well, now, they know and the jury will know that
19 Brissette and Sullivan had absolutely nothing to do with
20 those permits. Then I looked at the Department of Labor --
21 it's not a 302, it's a 103. And I go to paragraph 10 and 11,
22 which appears to be the meeting the Government was talking
23 about at the time. And the report reads, "Appel stated
24 'these are my landlords,' when asked about how he felt in the
25 meeting with City Hall. Appel said he did not think City

1 Hall would have withheld his permits, but they would have
2 issued bad ones with reduced times and poor hours, eventually
3 leading to the end of the show. He was worried about
4 blowback on future shows and needing to keep a good long-term
5 relationship with the City."

6 And then he says, "Appel always grouped the City
7 Hall departments together as one entity. He did not view it
8 as Brissette and special events or Malone at licensing and
9 consumer affairs, but all together."

10 And that's the problem here. We have an individual
11 charged with extortion. It's not a color of right case, it's
12 not a RICO case where the City Hall is the enterprise.
13 They're individuals, they happen to be public officials, but
14 for them to speak and the victim to understand that it's all
15 City Hall and to refer to it as all City Hall is hugely
16 prejudicial to this guy and to Sullivan, as well. And I
17 think that I'm not sure what we can do, but I think that the
18 Court has to instruct and give some instructions to the
19 Government about how they're going to present these witnesses
20 and how this evidence is going to come in. Because in the
21 final analysis, the jury has got to determine what Brissette
22 said, what Brissette did, and what Sullivan said and did, and
23 not what somebody else -- not what the victim might have
24 believed somebody else might have been doing behind the
25 curtain. This is not a color of right case. It's not an

1 official act case. It's individuals charged with threatening
2 fear of economic harm. And you're going to learn, there were
3 no threats, there was no fear, but today's not the day for
4 that.

5 MS. KAPLAN: Your Honor, just briefly. The issue,
6 in an extortion case is what the victims reasonably believed
7 about the defendants and their demands and it just so happens
8 that in this case --

9 THE COURT: Do you know whether the defendants
10 intended to extort?

11 MS. KAPLAN: I'm sorry?

12 THE COURT: Isn't it whether the defendants
13 intended to extort?

14 MS. KAPLAN: Well, and it's also what
15 the victims --

16 THE COURT: Would be evidence of the defendants'
17 intent?

18 MS. KAPLAN: Yes. Yes. But the fact is that the
19 defendants were employed by the City of Boston and the
20 meetings took place at City Hall. And the Boston Calling,
21 September 2014 festival took place on City Hall Plaza. So
22 just as with the last motion, the Government, we'll be as
23 precise as we can. And we're not going to be looking to
24 elicit testimony that City Hall, in quotes, did anything.
25 But we --

1 The victim in this case is entitled to testify
2 about their state of mind. And I don't think this is going
3 to be an issue. To the extent that we can ask the witnesses
4 who said what and who did what, we will do that. I don't
5 think that this is going to be an issue, Your Honor. The
6 Government is not looking to blow this up into a City Hall
7 case.

8 However, having said that, we are stuck with what
9 the victims in this case, what they believed and what they
10 felt. What Mr. Kettlewell was just talking about here, those
11 are statements from the victim in this case and we can't
12 tailor their testimony, or change their testimony, but to the
13 extent that we can use follow-up questions of who said what
14 to you, who was there at the meetings, we intend to do that.

15 THE COURT: Okay. Thank you.

16 Anything else on that?

17 MR. KETTLEWELL: Next one. Your Honor, the next
18 and last motion in limine is the motion with respect -- and
19 this is a redo, to some extent, and I don't intend to argue
20 what we argued before. I've read your order, I understand
21 your order. But what I do suggest, Your Honor, is this. To
22 the extent that the order --

23 THE COURT: Wait, which one is this?

24 MR. KETTLEWELL: This is the one -- I'm sorry. I'm
25 getting ahead of myself. Too much coffee at lunch.

1 This is the one with respect to statements about
2 illegality and about the -- some of the *Top Chef* evidence
3 related to somebody saying to Mr. Brissette, what you did is
4 not appropriate, or not legal, and some of the other evidence
5 about what he did or didn't do regarding permits in *Top Chef*.
6 Now, I still believe it's apples and oranges, but you -- we
7 covered that and you ruled, but I would suggest to Your Honor
8 that with -- with Appel in particular, the putative victim
9 here, if -- if he doesn't say --

10 Let's just say, when he testifies, he doesn't say
11 that the permits were threatened by Brissette, or he says, as
12 he said to the agents, it was City Hall that I was scared
13 about and not Brissette, then the hook for the admissibility
14 of these statements is common plan. The hook for the
15 admissibility of these prior statements --

16 THE COURT: You mean you're talking about *Top Chef*
17 now?

18 MR. KETTLEWELL: The *Top Chef* statements.

19 THE COURT: The ones that were the subject of my
20 prior order?

21 MR. KETTLEWELL: Correct. Starts to fall away and
22 the connection starts to fall away and as that falls away,
23 the prejudice goes up. And so my simple suggestion is this:
24 That the Court regulate the order of proof in the case to
25 some degree, and hear Mr. Appel first and understand what he

1 says and what he's going to say about permits being withheld,
2 permits being impacted, about what Brissette and/or Sullivan
3 said or did about permits, before you permit the Government
4 to put in this *Top Chef* evidence, because to the extent that
5 the permit issue starts to wash away with Appel, then I would
6 suggest to you, as I've said, that the relevance hook
7 disappears with respect to the *Top Chef* evidence. And those
8 statements about prior illegality and whatever conduct the
9 Government appears to want to put in, about what
10 Mr. Brissette said or did in May and June of that same year,
11 2014, becomes much more attenuated. That's my suggestion and
12 my request.

13 MS. BARCLAY: Um --

14 THE COURT: I guess, as a practical question, if
15 you're just calling Appel first anyway, that's doesn't
16 really --

17 MS. BARCLAY: Yeah, we're not. Your Honor, we
18 intended to get the *Top Chef* evidence out of the way quickly
19 at the beginning of the case and then move on to the crux of
20 this case, which is what we had said in response to the
21 original motion to sever and to keep out all of the *Top Chef*
22 evidence, is that we don't anticipate it's going to take a
23 long time. And to the extent -- I think what Mr. Kettlewell
24 is missing is one of the other points in your order, which is
25 that that evidence from *Top Chef* is relevant to why Brissette

1 didn't specifically verbally threaten to withhold a permit
2 when it came to Appel and Snow. Right? So it's relevant to
3 why it's an inherent threat, as opposed to a direct threat --

4 THE COURT: Inherent or implied?

5 MS. BARCLAY: Implied and inherent, both. I mean,
6 it's sort of a distinction without a difference as far as
7 this.

8 THE COURT: But one implies intent and one doesn't
9 necessarily imply intent. Implied threats would presumably
10 come with intent, because you intended to imply what you
11 implied and inherent threats might be intended and might not
12 be.

13 MS. BARCLAY: So it's an implied -- an implied
14 threat.

15 THE COURT: You weren't making that distinction?

16 MS. BARCLAY: I was not making that distinction,
17 I'm just saying it was not a verbal, direct threat. And
18 that's one of the points on which you declined to exclude
19 that evidence, is that you found that it would be relevant to
20 why the defendants didn't actually come right out and say,
21 you know, we're going to take your permits or we're not going
22 to give you the license agreement, or anything like that,
23 because at that point, Mr. Brissette was aware that any
24 discriminatory action, not just permits or anything like
25 that, on the basis of whether someone employs union members

1 or doesn't employ union members was inappropriate, and yes,
2 as one witness will say, he said it's illegal to do that on
3 the basis of whether they're a union employee or not.

4 So again, I just point to Your Honor's order, you
5 know, especially on the *Top Chef* stuff. I did sort of read
6 back through everything and I just want to make clear that we
7 do not intend to ask lay witnesses whether it would be
8 illegal to condition the grant of a permit or a license to
9 use City Hall Plaza.

10 THE COURT: You're only asking the people what they
11 said to Mr. Brissette or Mr. Sullivan?

12 MS. BARCLAY: Yes, although we may ask certain
13 current and former City Hall employees whether they have any
14 personal knowledge of a requirement that someone has to use
15 union labor in order to have an event on City Hall Plaza.
16 For example, Mr. Brissette's predecessor in that role would
17 testify that he knows of no requirement. Again, it's his
18 personal knowledge. It's not this is well-known or this is
19 illegal, or this is not a legal requirement, and the
20 defendants' can cross-examine him on that issue. But it's
21 relevant that the person who was in Mr. Brissette's job
22 immediately prior to him knew of no requirement that people
23 had used union labor in order to put on a concert on City
24 Hall Plaza.

25 THE COURT: Okay.

1 MS. BARCLAY: So just to be clear.

2 MR. KILEY: I didn't hear a lot about Mr. Sullivan.
3 And with respect to the order of proof, I don't know that
4 allowing people to talk about what somebody said to Mr.
5 Brissette, even, or what Mr. Cook, who preceded Mr.
6 Brissette, but not Mr. Sullivan, thought about it had any
7 relevance whatsoever to Mr. Sullivan.

8 THE COURT: Go ahead.

9 MS. BARCLAY: I can address that, Your Honor, and
10 again, I just point to your February of 2018 order.

11 THE COURT: The phone --

12 MS. BARCLAY: Right. I think what the Government
13 has said in the past is that there is evidence that Mr.
14 Sullivan was at least aware of the *Top Chef* events and
15 that's, I think, as Your Honor held, evidence of those events
16 bears on his knowledge and intent during the interactions
17 giving rise to the charges in this case.

18 MR. KETTLEWELL: Your Honor, could we just
19 understand what she means by the *Top Chef* events. I mean,
20 that could mean -- because they talked about a statement to
21 Brissette by one of his fellow colleagues. There is also
22 conduct by Brissette alleged by the Government with respect
23 to dealing with the production company. Then there is a
24 riot, more or less -- well, there's two things. There's a
25 huge and ugly demonstration at the Hotel Revere in Boston on

1 June 5th and then there's a very large and ugly demonstration
2 that was the subject of the *United States vs. Fidler*, where
3 everyone was acquitted in the following week. So --

4 Excuse me.

5 MS. KAPLAN: Not everyone.

6 MR. KETTLEWELL: The guy pled to a misdemeanor.

7 MS. KAPLAN: It wasn't a misdemeanor.

8 MR. KETTLEWELL: The jury convicted -- anyway.

9 THE COURT: You know, in the future, for both of
10 you.

11 MR. KETTLEWELL: I'm sorry?

12 THE COURT: You guys in court -- I don't think this
13 is unusual for either of you, but you speak to me. You want
14 to speak to each other, you can ask for a break.

15 MS. KAPLAN: I apologize, Your Honor.

16 MR. KETTLEWELL: Sorry, Your Honor.

17 THE COURT: Go ahead.

18 MR. KETTLEWELL: In any event, I think we need to
19 get more clarity and precision about what the events are, so
20 that we know what we're talking about here. Because some of
21 the people on the witness list are percipient witnesses about
22 what took place at the Hotel Revere and down in Milton and
23 other people are not. But there are four -- there are three
24 or four of them that might be.

25 THE COURT: I think I remember, but why don't you

1 tell me?

2 MS. BARCLAY: Yeah, we briefed this before, Your
3 Honor, and the events at the Hotel Revere and the events at
4 Milton are not part of the Government's anticipated evidence.
5 It's what happened between Mr. Brissette and the production
6 company. And I believe there's -- I believe there's only two
7 witnesses on this.

8 Right?

9 MS. KAPLAN: Yeah.

10 MS. BARCLAY: Right. I think we just have two
11 witnesses on the particular *Top Chef*, so to the extent that
12 *Top Chef* events -- my use of that sort of expanded it, it's
13 exactly what we told Your Honor before.

14 THE COURT: Okay. With respect to those motions, I
15 will think about them. Just a couple observations about the
16 evidentiary motions, which are that I sort of stand by what I
17 said at the beginning, which is that I think a lot of those
18 issues are issues that I need to hear the questions -- hear
19 the evidence, hear to rule on and -- and then see.

20 To the extent that the motion in limine about the
21 period between 20 -- January 1, 2018 and 2020 and rights to
22 have concerts during that period of time, whatever you want
23 to call that, be it an extension as the indictment says, or
24 an RFP agreement process, or whatever else you want to call
25 it, I think I need to hear the evidence to evaluate it. I'll

1 think about it a little more, but I'm just telling you all
2 this, because we're a week from trial and you should be
3 thinking about that. And you should think about all of that
4 and what follows from that.

5 The motion to dismiss, I don't have any more
6 questions for you and I'll think about.

7 Let me talk to you about jury selection, a couple
8 things on that. First, with respect to the -- it's my
9 practice to read to the jurors a statement of what the case
10 is about before I ask the questions, because I feel,
11 otherwise, they don't know what you're talking about when you
12 ask them the questions. So I don't think either of you
13 exactly wrote something, or if you did -- maybe you did. I
14 don't recall.

15 So anyway, I wrote something, I'll read it to you
16 and if you don't like it, you can tell me what you don't
17 like, whether you don't like my "the" should be an "an" or
18 whatever, but I'll read it to you. So this is what I was
19 thinking of telling them.

20 "This is a criminal case. The defendants Kenneth
21 Brissette and Timothy Sullivan are employees of the City of
22 Boston. Boston Calling is a music festival held twice each
23 year. The federal charges in this case arise from events
24 related to the Boston Calling festival held in September 2014
25 on Boston's City Hall Plaza. The Boston Calling festival is

1 produced by a company called Crash Line Productions.

2 The International Alliance of Theatrical Stage
3 Employees, Local 11, which you might hear referred to
4 "IATSE," or just "Local 11," is a labor organization
5 representing technicians, artisans and craftpersons in the
6 entertainment industry in Boston, including live theater,
7 motion picture and television production, trade shows, and
8 other live entertainment events.

24 MR. KILEY: Are you looking for responses now?

25 THE COURT: Well, for starters, for now. I mean,

1 we have --

2 MR. KILEY: A couple of nits, true nits. I don't
3 think Boston Calling is still now twice a year -- I don't
4 think the festival is twice a year.

5 THE COURT: Maybe I should just say held several
6 times each year?

7 MR. KILEY: Well, I think it's one now. I think
8 it's one now. It was two at the time.

9 I appreciate the Court's reference to --

10 THE COURT: How about if I just say it's a music
11 festival held each year?

12 MR. KETTLEWELL: Yeah. It's a nit.

13 To the extent that you want to explain to the
14 jurors what IATSE is, I know if I refer to it, I'm going to
15 refer to it as IATSE at some point. So consider that at some
16 point in the matter. Those are the two nits.

17 THE COURT: Don't say IATSE, call it IATSE?

18 MR. KILEY: I know if I refer to it, that's what
19 I'm going to say.

20 MS. KAPLAN: I think that's what the witnesses will
21 say, Your Honor. They'll say IATSE.

22 THE COURT: All right. I'll call it that. I'll
23 use that, as well -- instead of the letters.

24 MR. KILEY: Those are the nits and I would like the
25 opportunity to further address what may not be a nit, with

1 respect to an extension of a contract, because it isn't what
2 was happening, but you've heard from me on that point. And
3 Your Honor --

4 THE COURT: That's what the indictment says, that's
5 why I used those words.

6 MR. KILEY: I know it does.

7 THE COURT: I know.

8 MR. KILEY: And what -- what I'm going to do is
9 order a transcript and I'd like the opportunity, if I see
10 something else --

11 THE COURT: Sure. If you see something, either of
12 you can raise it.

13 MR. KETTLEWELL: Your Honor, I have just one word
14 issue and that is you used the word "insisted" when you --

15 THE COURT: I took that from the indictment, too.

16 MR. KETTLEWELL: I'm sorry?

17 THE COURT: I took that from the indictment, as
18 well.

19 MR. KETTLEWELL: I understand, but I think it
20 should be demanded, but that would be my suggestion.

21 THE COURT: Okay. Do either of you have anything?

22 MS. KAPLAN: When you said "induced them with
23 wrongful use of fear of economic harm," you said they were
24 awaiting permits, seeking extension of the contract, it
25 actually says "awaiting the issuance of certain permits and

1 approvals," because the evidence will be also about the
2 entertainment license, which was outstanding at the time of
3 the September 2nd meeting.

4 THE COURT: I thought of that as a permit, as well,
5 but you think of that as an approval, not a permit?

6 MS. KAPLAN: Well, they needed that in order to
7 actually operate, so that was the key document.

8 THE COURT: Here's what I'm thinking about. These
9 aren't jury instructions. This is what I'm telling them, so
10 that they have -- armed with sufficient information to be
11 able to answer the questions and I don't want to make it
12 too -- I just am wondering, if it fits your purposes, I could
13 put in permits and approvals that it needed. That's what
14 you're suggesting, right?

15 MS. KAPLAN: Yes, Your Honor.

16 THE COURT: I'm just trying to keep it simpler,
17 what if I just said it was awaiting certain authorizations.
18 I mean, it's just one word, but if you want me to say permits
19 and approvals, I'll say permits and approvals. I mean,
20 that's what the -- fine. Permits and approvals.

21 MS. KAPLAN: Either way is fine, Your Honor.
22 Authorization is fine, as well.

23 THE COURT: Okay. What about Mr. Kettlewell's --

24 MR. KILEY: From my perspective, Your Honor, the
25 more precision, the better.

1 THE COURT: Fine. So I'll say permits and
2 approvals.

3 What about Mr. Kettlewell's suggestion that it
4 should be "demanded" instead of "insisted"?

5 MS. BARCLAY: I think Your Honor said that it
6 was -- that it said insisted in the indictment.

7 THE COURT: It does say insisted in the indictment.
8 I was looking for a word and I looked in the indictment
9 and --

10 MS. BARCLAY: It's a colloquialism, where at the
11 beginning, at the outset of the case, and it says in
12 paragraph 18, that they insisted that half of the labor force
13 consist of union members. I don't see anything wrong with
14 using that term.

15 THE COURT: I'm not asking if it's wrong. I don't
16 think it could be wrong. I am just wondering whether
17 demanded would be a better word for the purposes of telling
18 people about what's going on to answer the questions about
19 what this is for jury selection.

20 MS. BARCLAY: I don't think demand -- I don't think
21 it's necessary at the outset of the case. I think insisted
22 is consistent with the indictment. That's what we would
23 agree with. We don't think that we need to say "demanded,"
24 or the Court needs to say "demanded" at the outset.

25 THE COURT: All right. So for the -- a lot of what

1 you both suggest that I'm doing, but -- in the voir dire
2 questions, but not all of it. And I think the simplest way
3 for me to do this is let me just tell you what -- the topics
4 that I am covering and then if I didn't cover one of your
5 topics, you either know I'm not including it, or you can ask
6 me about it.

7 So initially, I'll be asking sort of the standard
8 questions, if they know all of you and the defendants
9 themselves, and have they ever worked with them, and the
10 like.

11 You'll need to provide me a list of names. I don't
12 need it today, but I need it for the jury selection, a list
13 of all the people who will be called, or that you both will
14 anticipate calling as witnesses, and if you think there's
15 another person who might not be called as a witness, but you
16 think they're -- given who they are, if a juror knows that
17 person, we should know, you need to put them on the list and
18 I explained the list in that way. It may be a lot of names
19 and I say the jurors don't worry -- it doesn't mean, because
20 you hear a name, they're being called, but these are people,
21 if you know them.

22 And to the extent they're appearing in a -- some
23 sort of -- have some sort of capacity that relates to the
24 case, if it's like the case agent, you would obviously say
25 special agent and FBI, right?

1 MS. BARCLAY: Yes, Your Honor.

2 THE COURT: So it will say that, or what have you,
3 the usual way will be fine. And so that's the first section
4 of questions. Then case specific, I'd also -- I'm also going
5 to ask them, in addition to involved or with lawsuits or work
6 with the like with the law firms and the US Attorney's Office
7 and the FBI, or the Department of Labor, I'll ask them
8 whether they have -- I'm just finding it here -- whether they
9 have worked with the union, Local 11. And have you and a
10 family member, or a close friend ever been a member of,
11 worked for, or dealt with IATSE. That's how you say it?

12 MS. KAPLAN: Yes.

13 THE COURT: I'll ask them the same about Orkila,
14 Crash Line and Bill Kenny. They know about the case, have an
15 interest in the outcome. Have you formed an opinion about
16 the case, expressed an opinion, do you have any strongly
17 positive or strongly negative views about any City of Boston
18 employees, or public officials in Boston? Do you have any
19 strongly positive or strongly negative views about labor
20 unions? Have you, a family member, or a close friend ever
21 held public office or worked for an elected official. Are
22 you aware of bias, prejudice, or a reason that would make it
23 difficult serve as an impartial judge of the facts. Is there
24 anything about the case that would make it difficult for you
25 to do that, have you ever worked for or attended the Boston

1 Calling music festival. Are you a family member, or a close
2 friend trained or experienced in large event planning or
3 concert promotion. Did any of you work on or otherwise know
4 about the filming of the reality television show Top Chef in
5 Boston in 2014.

6 And then I'll explain to them the various general
7 principles of law that apply in every criminal case, the
8 presumption of innocence, reasonable doubt, that the
9 Government has the burden of proof, the right not to testify.
10 That they have to follow my instructions and not the laws as
11 they make it up. That they can't discuss the case with
12 others, they can't do research, post about the case, or
13 anything like that. They have to serve fairly and
14 impartially and what that means, and would they have any
15 difficulty doing that. Do they have any religious, moral,
16 political and the like beliefs about sitting in judgment of
17 another person that would interfere, or that they can't
18 consider punishment, would they hesitate to find the
19 defendant guilty because of the possibility I might impose a
20 jail sentence.

21 All of that is pretty standard. I'm sure you've
22 heard it all before. I'll ask them about whether the
23 potential juror, family member, or a close friend have been
24 employed by law enforcement agencies, including the FBI,
25 Department of Labor, and the various local more generically

1 local state and federal agencies and corrections offices.

2 They'll hear testimony from law enforcement -- they will or
3 may hear testimony from law enforcement officers?

4 MS. KAPLAN: They will.

5 THE COURT: Will. They will hear testimony in the
6 case from law enforcement officers and they have to weigh
7 that the same as any other witness. Do they have difficulty
8 following that? Have you had any dealings with law
9 enforcement, whether favorable or unfavorable, might
10 influence your consideration of the case. Have you, a family
11 member or close friend been involved in a lawsuit or a claim
12 against a law enforcement, or officer agency. Have you a
13 family member or a close friend ever been involved in a
14 criminal case in any court as a victim, witness, lawyer,
15 court employee, or person charged. Prior service, hearing,
16 difficulty understanding English language, physical
17 disability, schedule, we'll come back to in a schedule, and
18 then a catch-all, is there anything else that --

19 Before I hear -- well, we'll come back to schedule,
20 after I hear if you have any issues about any of that.

21 MS. BARCLAY: I think just one. I think you talked
22 about whether you or any family member or close friend has
23 held a public office and I think the Government included in
24 its requests also whether you or a family member or a close
25 friend or a member -- or have been a member of a union. So

1 we would ask for -- you may have already said it, but I --

2 THE COURT: I didn't ask that question. I did ask
3 if they have any strongly positive or negative views about
4 unions and I asked them whether they've -- that you, a family
5 member, or a close friend, ever been a member of or worked
6 with or dealt with IATSE. I don't have a question of just
7 whether you, a family member, or a close friend is a member
8 of a union.

9 MS. BARCLAY: The Government would ask, just for
10 the same reason, that there's a question about whether you've
11 held public office, it just -- it's a little close to home
12 here and we just want to know about it and be able to ask the
13 potential juror about that issue. It wouldn't, in and of
14 itself, be disqualifying, but it's something for further
15 follow-up.

16 THE COURT: I'll think about that.

17 All right. That's it for you?

18 MS. KAPLAN: Yes.

19 MR. KETTLEWELL: Just one thing, Your Honor. This
20 case has been somewhat highly publicized, both in -- in news
21 papers and on television and the radio. So I'd ask that you
22 ask the general question, we proposed one, about any exposure
23 to pretrial publicity and whether, if you were exposed, it
24 has any way influenced or made you unable to be fair in the
25 case.

1 THE COURT: I ask the general question, have you --
2 any of you heard or read anything about this case. I might
3 have sped over it a little bit, because I ask it --

4 MR. KETTLEWELL: Or maybe I missed it.

5 THE COURT: I ask it in every case. And do you
6 know anything about the case, Mr. Brissette or Mr. Sullivan.
7 And if they answer yes -- so if they answer yes to any of
8 these questions, I'll get to that in a minute, in sort of the
9 jury selection, but then they'll come over to sidebar and
10 we'll ask them follow-up.

11 MR. KILEY: In our proposed voir dire, we raised
12 issues with respect to applications for permits, interactions
13 with the Government, and whether the experiences in seeking
14 such things from Government, again, generated any kind of
15 response, and I would ask you to -- I don't think that any of
16 the things that I heard captured that.

17 THE COURT: So I thought about that, Mr. Kiley, but
18 some of that is so broad, like have you ever sought a permit
19 from the Government and we've had a lot of discussions about
20 extensions and agreements, permits and licenses, but I would
21 imagine all of you, for example, have a license from the
22 Commonwealth of Massachusetts.

23 MR. KILEY: I have one in my pocket.

24 THE COURT: Right.

25 MR. KILEY: I have two in my pocket.

1 THE COURT: Two. Right.

2 MR. KILEY: And I don't mean --

3 THE COURT: I know you don't mean that.

4 MR. KILEY: And I don't mean that. And that's why
5 I frame it in the broad, general sense. If we've got
6 somebody who has had an interaction with Government, a
7 developer -- a lot of people apply for permits and licenses
8 that are not the run of the mill that every citizen has, or
9 even some -- a lot of people have, so I didn't capture it. I
10 don't think I captured any of that and I think it important.

11 THE COURT: I'll think about that. Okay.

12 How long -- if I recall, you said two weeks, plus
13 jury selection. That's what I remember from last time.

14 MS. BARCLAY: That's still the case.

15 THE COURT: You both agree with that? What I'll
16 tell you what I'm thinking about when I ask the question and
17 if it causes you to think about it more now that we're
18 further along, that's fine. I like to tell the jurors the
19 outermost date. In other words, if I say to them two weeks,
20 that means to me that they will, irrevocably, receive the
21 case in two weeks or less. It's fine if it's less. But so
22 that's -- and telling them this for them planning their
23 schedule, so that when they come up to sidebar and say, well,
24 two weeks is fine, Judge, but in three weeks I'm going away
25 on my preplanned vacation that I'm saving my whole life for,

1 I'm going to say to them, you're good, because you're going
2 to have this case in two weeks.

3 And so, in that sense, just to remind you about the
4 schedule, we'll hear evidence from 9:00 to 1:00, we'll take a
5 break around 11:00 for about 15 minutes, 20 minutes. I meet
6 with the juror -- I'm sorry, I meet with the lawyers every
7 morning. We'll start with 8:30. If -- and the purpose of
8 meeting in the morning is so that we can review whatever
9 issues that you anticipate might be coming up that day and
10 then we can hash them out then. I might not be able to
11 resolve them for you then, but you've made your arguments and
12 we don't need a sidebar. I'm not saying that there's never a
13 sidebar, but you've made the argument about some questioning
14 and then I hear the questioning, and an objection, and I
15 heard it. Unless there's something different, I don't need
16 to have the jurors sit there while we have that legal
17 discussion. I can have that legal discussion in the morning
18 and then make the ruling once I hear the evidence, once I
19 know what it is.

20 That could vary to 8:15 to 8:45, depending on I
21 really take the lead from all of you, as to what you think is
22 coming up. And likewise with that, if you think that it's
23 Wednesday and you think on Friday you're going to get to a
24 witness that there's a big issue about and it would actually
25 be helpful to read their grand jury testimony to figure out

1 whatever the issue is, give me on Wednesday or Thursday the
2 grand jury testimony, so I can read it Wednesday or Thursday.
3 So when we come in Friday morning, I've read it, as opposed
4 to hand it to me Friday morning at 8:30, I can't read the
5 whole grand jury testimony and hear you all out and start at
6 9 o'clock. So --

7 And we'll go until 1:00. If it's coming upon 1:00
8 and you're done with one witness, call the next witness.
9 Don't like, say, well, it's ten of 1:00, so -- we can't
10 forget those ten minutes. So that's -- if you think about it
11 that way, given with that, I guess then the question would be
12 how long do you reasonably think it is in terms of telling
13 the jury?

14 MS. BARCLAY: So Ms. Kaplan just reminded me of an
15 issue that came up last week, I think late last week. I
16 think the defendants have -- they are not going to stipulate
17 to the admission or to the authenticity of phone records, so
18 we actually have to call a couple of keepers of records that
19 we weren't originally anticipating calling. So -- and again,
20 I'm not sure -- we filed a notice of a 1006 summary to try to
21 do that quickly and not have a witness on the stand for days,
22 but I think the defendants intend to cross-examine and
23 potentially ask for additional witnesses on this issue, so
24 that could bring it beyond the two weeks.

25 THE COURT: Does that add another day?

1 MS. BARCLAY: I think that's probably a reasonable
2 estimate of time. But again, I don't know. I don't know
3 what they intend to do.

4 THE COURT: So in terms of if we pick the jury on
5 Monday and let's just say we got all the jurors on Monday,
6 then we would do opening statements and preliminary
7 instruction on Tuesday, and start the evidence on Tuesday.
8 So originally, I would say two weeks. That would be four
9 days that week, five days the following week, one day the
10 following week would be August 5th, I think. So for
11 evidence. So what you're saying is, best estimate, tell the
12 jurors that really, that they receive the case on the 6th or
13 the 7th?

14 MS. BARCLAY: That's the Government's best
15 estimate, yes.

16 THE COURT: Do you agree with that?

17 MR. KETTLEWELL: I think it will be shorter, but
18 that falls within your exception?

19 THE COURT: Right.

20 MR. KILEY: Did I understand that to be the
21 Government's case?

22 THE COURT: Well, I'm thinking about the whole
23 case? In other words, what I'm thinking about now is --

24 MR. KILEY: You're thinking about the whole case.
25 And I'm just not sure whether that's the way the Government

1 responded. If that's --

2 THE COURT: I understood them to mean that that's
3 what they anticipated for their -- presentation of their
4 evidence. What they anticipated as cross-examination and
5 whatever they understand about your case, what they
6 anticipate the time for your case?

7 MS. BARCLAY: That was my response, but again, it's
8 difficult for us to determine, based on how many witnesses.
9 But I think that's what we discussed last March, is that, I
10 think that's what the parties had agreed, but I could be
11 wrong.

12 MR. KILEY: Again, speaking practically, I think
13 it's conceivable that we would go -- I think we will finish
14 within that time period, but if you want to give people a
15 maximum because of their lifetime travel trips, weekends
16 matter, and to me, it's conceivable that we'll get into --
17 that they'll have to come back the beginning of --

18 THE COURT: What I want to be able to tell them is
19 when they'll receive the case.

20 MR. KILEY: Yeah.

21 THE COURT: So what I guess I'm hearing from all of
22 you is I should tell them they can receive the case between
23 the 5th and the 9th of August. I will have to pick a date,
24 but that's -- within that time frame.

25 MR. KILEY: I agree.

1 THE COURT: All right. I just want to make a note
2 of that. Okay.

3 Let me just go over how we'll pick the jury. First
4 of all, how many -- there will be 12 jurors. How many
5 alternates do you both suggest?

6 MR. KETTLEWELL: I would say two, Your Honor.

7 MS. BARCLAY: The Government would say three. We'd
8 err on the side of just where we're getting into that third
9 week there.

10 THE COURT: What do you say, Mr. Kiley?

11 MR. KILEY: No view.

12 THE COURT: Okay. All right. I'll probably seat
13 three.

14 So that would mean -- the next question is, under
15 the rules, we do two rounds; the jury and the alternates,
16 unless you all agree to do it as combined. That's up to all
17 of you. I'm not going to do it as combined -- when I say
18 combined, what that means is we -- if we do it in two rounds,
19 there's 12 and they're the jury and the next three are the
20 alternates. And then you exercise the strikes you get for
21 the jury, on the jury. And then separately, you exercise the
22 strikes you get on the alternates on the alternates. If we
23 do a combined, you get to combine your alternate and jury
24 strikes together and I'll just sit 13 -- 15. Sorry. 15.
25 And you can just combine and we'll do it and the three

1 alternates would be the last three seats, so to speak.

2 MS. BARCLAY: The Government takes no position. We
3 would agree if the defendants agree.

4 THE COURT: Okay.

5 MR. KILEY: We're in agreement.

6 THE COURT: To what?

7 MR. KETTLEWELL: To combine.

8 THE COURT: To combine. Fine. All right. I think
9 it's simpler, but not everybody agrees.

10 Okay. So then this is how it will work. I go over
11 it, so -- and if you have any questions, just ask. Because
12 I'd rather you ask questions now, then tell me after we're
13 done or in the middle of it, that, oops, you did it wrong,
14 because I'll be less sympathetic then, because I'll have told
15 you about it now.

16 So the venire will come in. I give them a little
17 introduction, which is pretty standard, and I say pretty much
18 the same thing in every case. And then I'll read them the
19 statement that I read to you. And then I'll begin to ask
20 them all the questions that I read to you, we talked about.
21 And each time we ask a question, we'll ask the jurors to tell
22 us their juror number, which will be between one and however
23 many jurors we have. Okay. And they will be sitting in the
24 gallery. Juror number 1 will be sitting in the row closest
25 to the bar, to my far left, and they'll be going all the way

1 across, one to -- I think it's five -- 20. I think it's
2 five, all the way across, it will be one to 20 in the first
3 row and across to the second row on my far left number 21 and
4 across like that. And you'll get the list, you all have seen
5 it before, listed one to whatever number we have.

6 And so on the first question, do they know the
7 lawyers for the Government. And if somebody raises their
8 hand, I'll say, okay, you're juror number 12, or what have
9 you, and so you'll all know that. And I'll -- on my list,
10 I'm keeping track of that, that they answered yes to question
11 one. And we'll go through that until I'm done with all the
12 questions. And then when I'm done with all the questions,
13 one by one, call the people up to sidebar.

14 The people who did not raise their hand -- so if
15 juror number one answered yes to that question, we call them
16 up, we'll ask about it. If juror number 2 never answered yes
17 to any questions at all, I will ask juror number two if
18 there's anything that they want to come up for, because I'll
19 tell people at some point in this process, if you don't raise
20 your hand, but you have something you want to bring to my
21 attention, you can come up. So usually to my experience, the
22 people who didn't raise their hand say they pass, but once in
23 awhile someone -- either they thought of something or what
24 have you, so they'll come up. And we'll go through them one
25 by one, asking the questions at sidebar.

1 I will initially ask the questions of whatever is
2 related to -- brought them up to sidebar. If -- I will then
3 give all of you the chance to ask follow-up questions related
4 to the things that brought them up to sidebar. So it's not
5 the chance to ask them about some other thing that's totally
6 unrelated, but reasonable follow-up related to the questions
7 that brought it up, that brought them to sidebar. And if you
8 think that I didn't ask -- they answered yes to question 22
9 and I didn't ask them about question 22, feel free to say,
10 Judge, they also said yes to question 22, and I'll ask them
11 about that and then --

12 And then when we're done with that process, I'll
13 send the person back to the audience. At that point, before
14 I bring the next juror up, is when you should make a motion
15 to strike for cause, if you wish to strike the person for
16 cause.

17 MR. KILEY: Would you repeat that, Judge, at which
18 point?

19 THE COURT: Yes. That is we're done with the --
20 I'm done with my questions, all of you lawyers are done with
21 your questions to the juror. I will say to the juror, thank
22 you very much, have a seat. And then -- and I'm not going to
23 like bring the next one up before you get the chance, I will
24 give you the chance, but then, before the next one comes up,
25 before I call the next person, that's when you should make

1 your motion to strike. And then I will hear you then, I'll
2 decide then, either to strike them or not. Or sometimes I'll
3 call the person back for more questioning, if I think that
4 will be helpful. But that's when they're fresh in my mind,
5 that's when it's the easiest opportunity to ask further
6 questions, if necessary. They go back and sit down, we get
7 to the next one, I'm done with that juror.

8 I will tell you that there are occasions when I
9 will say about somebody, this is mostly about scheduling. If
10 someone has a scheduling issue and I might say to you, I'm
11 thinking about excusing them, but I'm kind of reserving,
12 depending on how many people have scheduling problems, in
13 which case, when we get to the end, I'll come back, and then
14 we can talk about that person and that scheduling issue then.
15 But usually -- but make it then and I'll rule then, unless I
16 tell you otherwise.

17 MR. KILEY: Do you anticipate that counsel will
18 be --

19 THE COURT: Counsel will be at sidebar the whole
20 time.

21 MR. KILEY: And we'll make our motions from there?

22 THE COURT: Yes. In other words, we'll just come
23 up to sidebar. The first person will come up, I'll talk to
24 them, send them back. Second person will come up, send them
25 back. You can have your clients there, if you wish, but they

1 don't have to be there. That's up to you. And so -- but
2 they obviously don't ask the questions. So it will be a
3 little crowded, but we'll make it work.

4 So we'll go through them one by one, until, if I do
5 my math right, it will be 15 jurors. So we're three -- how
6 clever, three. And so three alternates gives you each two
7 extra strikes. So -- all right. So then we'll go through
8 the venire, until we have a few more clear -- I think that
9 means we would need 35 cleared jurors. So we have a few more
10 than 35 cleared, just in case something comes up after we --

11 So once we're done with that, that might take us
12 through all the people in the room and maybe this is easy,
13 it's summertime, and everyone wants to be on a federal jury,
14 and maybe it doesn't. So when we reach that point where we
15 have enough cleared, then I'll stop. I don't see the point
16 of bringing more people up to sidebar, once we get to a few
17 more than that. And then the next part --

18 So the next part -- so once we have enough cleared
19 people, I'll seat 15 in the box, because we're doing
20 combined. And I will ask each juror to -- each potential
21 juror to state just what does he or she do for work. If he
22 or she is retired or doesn't work, what they formerly did.
23 If they live with a partner, spouse, significant other, or
24 something similar, what that person does for work. And so
25 you get to hear, at least -- because some people won't have

1 come up. You'll get to hear something from everybody. And
2 it will be the same thing and we'll just go through the line
3 for the first 15.

4 And then we'll go -- we'll do -- I'll give you a --
5 some time, probably not as much as you want, but some time to
6 review everyone, what you want to do. And you'll come up to
7 sidebar and the first round, Government/defense. And I have
8 a question for the defendants, but we'll come back to it. So
9 the first round, Government/defendants. And we're -- if this
10 were one defendant, it would be Government makes one strike,
11 defendant makes two, back and forth, until you're even in the
12 number of strikes and then one and one. In the first round,
13 you strike no one or everyone, whatever you want. And then
14 when you both tell me you don't want to exercise any more
15 strikes on the people on the box, I'll excuse the people in
16 the box you struck by either side, just to send them on their
17 way. And then I'll fill the next seats, just the empty
18 seats. And then I'll ask just the new people to answer the
19 same question and then we'll do round two.

20 Round two we'll start with the defense --
21 defendant, Government, back and forth, but no back strikes.
22 So in round two, you can only strike the new people in the
23 box and we'll go back and forth like that and then I'll
24 excuse those people, round three, Government goes first in
25 round three, back and forth, but again, no back strikes. So

1 the universe of people you can strike in each round is
2 getting narrower. And then either when you say you don't
3 want to make it -- no one has any more -- either is out of
4 strikes or doesn't want to exercise any more, we're done.

5 The way I will call them up is juror number 1
6 first. So I'll start with the people being seated by -- in
7 the jury box, juror number 1, juror number 2, juror number 3
8 was excused, so then I'll go one, two, four. Like that. And
9 if the first 15 people were cleared for cause and they'd be
10 the first 15 jurors and then juror 16 to 20 had been struck
11 for cause, when -- the next person in the box would be juror
12 number 21.

13 Is that clear? I don't think I'm the only one who
14 does it this way. Okay.

15 So -- and once we're done, we're done with that,
16 then I'll send everybody else on their way. Maybe I'll --
17 depending on what other trials are going on, I might send
18 some of the people back, once we clear enough, I might send
19 them back earlier, but you don't really care about that, I
20 don't think.

21 Okay. So are you exercising your strikes jointly?

22 MR. KILEY: We haven't talked about it. I think
23 so.

24 MR. KETTLEWELL: Yes, Your Honor, I think we will.

25 THE COURT: Okay. All right. Fine.

1 All right. Any questions about any of that?

2 MS. BARCLAY: Not from the Government.

3 MR. KILEY: I just have one housekeeping.

4 THE COURT: Sure.

5 MR. KILEY: Is the courtroom going to be open to
6 family?

7 THE COURT: Of course. The courtroom is not
8 sealed.

9 MR. KILEY: Are they going to interfere with the
10 seating arrangement to --

11 THE COURT: No, so what they'll do is we'll --
12 people who want to be here, whether it's the press, the
13 public, family members, we will -- I'll work with Jim McAlear
14 of the jury clerk, to be sure that there are at least some --
15 the doors remain unlocked the whole time, obviously, and
16 there will be some seats, at least, for people. If --

17 You know, there is the possibility, but I'm not
18 sure -- I could issue -- there are a couple courtrooms on the
19 end that are a little bigger and they have like I think
20 another row or two, with a few more seats, I could possibly
21 move there for just the jury selection. We can think
22 about -- I'll think about that.

23 MR. KILEY: But there's no preconceived place where
24 they're going to be?

25 THE COURT: Not yet, but I'll work on that and I'll

1 tell you.

2 MR. KILEY: Okay.

3 THE COURT: Okay. Anything else?

4 (The Court and the law clerk confer.)

5 THE COURT: All right. So preliminary
6 instructions, let me just talk to you briefly about that. A
7 lot of what -- what I typically say in criminal cases is two
8 things. One is just what's evidence, what's not evidence.
9 It's pure boilerplate. I'm not going to sit here and read it
10 to you, you won't find it exciting, and if you're really
11 interested, you can pull the transcript from almost any other
12 criminal case, and it's the same. It just tells them what is
13 and isn't evidence, that lawyers have a duty to object, but
14 you know what's evidence, not the lawyer's statement, it's
15 the question and the answer, things like that.

16 And then there's -- sometimes I would tell them
17 something of the elements. What I'm thinking of here, but
18 I'm just thinking about it, and I want to know what you
19 all -- you all can weigh in on this, is simply saying
20 something like this: They're charged with two crimes,
21 they're -- one is conspiracy to commit extortion, one is
22 extortion. Here's the elements of what extortion is and I'm
23 going to give you the further detail and the final
24 instructions about obtaining and wrongfulness and economic
25 harm and all of those things that you've submitted jury

1 instructions on about which you disagree, in greater detail
2 later, and you should pay attention to those. I anticipate
3 the evidence will focus a lot on those concepts or evidence
4 related to those legal concepts. It gives them some picture
5 of what it is, but -- so that's what I'm thinking about.

6 I'm open to -- I know you've -- I think the defense
7 has requested more. So anyway, that's what I'm thinking
8 about. You can comment about that if you wish.

9 MS. KAPLAN: That's fine with the Government, Your
10 Honor.

11 MS. SILVA: Your Honor, we did ask for a little bit
12 more. And that's on this issue of wrongfulness that we've
13 identified. I know we talked about it briefly today, we've
14 briefed it. The issue that we see is this juxtaposition
15 between wrongful use of fear of economic harm and under color
16 of official right.

17 We think it would be helpful to orient the jury to
18 say what the defendants have not been charged with, because
19 in light of the overlapping, what I will say, theories that
20 the Government has put forward, I think it's important for
21 the jury to know, for example, the defendants have not been
22 charged with accepting any payment. The defendants have not
23 been charged with agreeing to take any official act. We
24 presented a proposed jury instruction to you on that ground.
25 I appreciate it may be longer than the Court might be

1 inclined to do as a preliminary basis, but we do think it's
2 important to orient the jury before the jury begins to hear
3 evidence what precisely the defendants have been charged
4 with, understanding as we do, the jury won't, obviously,
5 understand this at this point, but as we do, that the
6 defendants have not been charged with an under color of
7 official right extortion case.

8 THE COURT: Okay. I'll think about that. I'll --
9 I think I'm inclined to tell you all more --

10 Yes, go ahead, Mr. Kiley.

11 MR. KILEY: I just want to flag that I am
12 anticipating perhaps filing another requested preliminary
13 instruction. I haven't filed it yet.

14 THE COURT: All right.

15 MR. KILEY: And I am anticipating -- I am planning
16 on conferring with the Government on another motion, but we
17 have, again, not filed. There are a couple of open issues
18 that I'm not prepared to address today, because I haven't
19 done the filings.

20 THE COURT: Fine.

21 MS. KAPLAN: Your Honor, just on that last issue, I
22 think the Government would object to that. I think that's
23 going to be extremely confusing to talk about --

24 THE COURT: I'm sorry, which -- about what
25 Ms. Silva has said?

1 MS. KAPLAN: Yes, what Ms. Silva said. To talk
2 about a charge that the defendants are not charged with. I
3 mean, we can come up with ten other charges that they're not
4 charged with. So I think it's confusing, I think it would be
5 prejudicial. The defendants can certainly talk about it in
6 their opening, I suppose, and certainly in their closing.

7 THE COURT: I will think about it. I think that
8 the way I think about the sort of preliminary instruction on
9 the charge is that it should be helpful to the jurors who
10 aren't as familiar with this area of law and what they're
11 going to hear, to help them understand what it is that
12 they're hearing in the course of the trial and why they're
13 hearing, to some degree, what they're hearing.

14 So I think that I will probably, with respect to
15 the preliminary charge, not the whole thing, but the part
16 about the elements and the like, read that to you Monday
17 after you pick the jury, but before you do your openings,
18 just so you know what it is, because I don't think that the
19 rules necessarily require that, but I don't know that they
20 speak to that, and you'd have that to think about. But the
21 framework of what I'm thinking about is what I described to
22 you.

23 There was another motion I haven't addressed that
24 the Government filed, I think, Friday, about certain *Top Chef*
25 evidence, wanting to keep it out. So you can respond to it

1 now, I can give you a little bit of time to file something if
2 you want to later in the week. That's fine. And then --

3 MR. KILEY: That's what we had anticipated doing,
4 filing.

5 THE COURT: Fine. When do you think you'll file?

6 MR. KILEY: When you tell us to, and we propose
7 Wednesday.

8 THE COURT: Wednesday is fine. End of the day
9 Wednesday. Okay.

10 All right. I don't think there are any other
11 motions?

12 MR. KILEY: None pending.

13 THE COURT: Okay. All right. Monday, the last
14 word I'd heard was we'd have jurors at 9:30, so I think we
15 should meet at 9:00, if these other -- the pending motion or
16 if the -- whatever you're going to confer about leads to
17 something else. If we need another hearing, you can ask for
18 it, or I'll schedule one. Otherwise, I'll see you Monday.

19 MR. KETTLEWELL: Judge, can I just take up a few
20 housekeeping matters, just so we're all on the same page?

21 THE COURT: Yes.

22 MR. KETTLEWELL: In other cases I've had, tried in
23 this court, not yours, but other judges, there is a
24 notice requirement -- well, not a requirement, but an ask by
25 the Court that the Government tell us 36 hours in advance who

1 they're calling, and that would facilitate, obviously, a
2 meaningful discussion at 8:30 in the morning before you,
3 because we would know who's coming, we would be prepared and
4 we could address the concerns, the issues, the objections and
5 all the legal issues that flow from that. So I would ask
6 that the Court consider that.

7 Secondly, just some guidance from the Court on the
8 numbering system for the exhibits so that we do it the way
9 you want it done. Everyone in the building has a slightly
10 different view on it and I want to make sure we do it the way
11 that you wish --

12 THE COURT: So as to the numbering, the most
13 important thing to me to the numbering is that they're
14 accurately numbered and uniquely numbered. The view of like
15 sequentially numbered as they come into evidence, one to
16 whatever, versus you premark your exhibits as 1 to 100 and
17 you go 101 to 200 and only some subset of those 200 exhibits
18 comes into evidence, that's also fine with me. I intend to
19 explain to the jury whether -- however you do the numbering,
20 that the numbers mean nothing other than a method of
21 referring to the documents and they don't have any -- the
22 numbers have no significance. So I suggest the two of you,
23 in the first instance, work it out. The biggest issue for me
24 is I don't want to waste time in the courtroom with the jury
25 marking the exhibits and putting stickers on and numbering

1 them. You should -- that may come up with a particular
2 exhibit that someone didn't anticipate or something, but
3 generally, you should have them premarked. And I don't care
4 if you use two numbering systems like Government and
5 defendant or you use one sequential. I will, either way,
6 tell them that there's like all the evidence is relevant to
7 whatever consideration and the numbers don't have any
8 independent significance.

9 MR. KETTLEWELL: We'll work that out, your Honor.

10 THE COURT: As to the time, that seems reasonable,
11 it's what typically happens. I don't know if you've talked
12 to the Government about that or not. Just about the notice
13 on each side of who's being called.

14 MS. BARCLAY: Your Honor, it's generally been my
15 practice and I don't know what the Court -- but to give, at
16 the end of each day, the next three witnesses, and that
17 generally takes you -- just a 36-hour requirement seems a
18 little bit set in stone and difficult to predict, but
19 certainly at the end of the day, we can tell the defense who
20 we anticipate the next three witnesses will be, which should
21 carry us through the next day. If it's not going to, then
22 we'll definitely ensure that they know who the next witnesses
23 are for the next day.

24 THE COURT: So I think you at least have to tell
25 them who they are for the next day.

1 MS. BARCLAY: Certainly.

2 THE COURT: Because otherwise, three -- I
3 understand three could be three days, three could be an hour.

4 MS. BARCLAY: Right.

5 THE COURT: So if it's an hour, that doesn't
6 really --

7 MS. BARCLAY: We're not going to be in a position
8 where we are getting to five witnesses in one day and have
9 not told the defendant who the fourth and fifth witnesses
10 are, that's just not our practice, so --

11 THE COURT: You want more than the day before
12 notice?

13 MR. KETTLEWELL: Judge, I just want to know who's
14 coming up the next day, really. And that way we can, as I
15 say --

16 THE COURT: If you're content with that, then fine.

17 MR. KETTLEWELL: I would prefer 36 hours, because
18 then it keeps us on track, but, you know, I --

19 THE COURT: So in the first instance, I'm going to
20 leave it to all of you. My suggestion is this: This is
21 not -- a lot of the evidence is not a secret. So I would
22 suggest you tell them like two days, because I think it will
23 be more practical and will run more smoothly, but at the
24 moment, I'm not ordering you to tell them two days in
25 advance, but they're going to know everyone, anyway, and you

1 already told them one or two days right now and so I'll leave
2 that in the first instance to work out. I think I issued a
3 sequestration order before the last trial, but if I didn't, I
4 assume you all want that, accepting the case agent?

5 MS. BARCLAY: That was the one request that we had
6 was the case agent.

7 MR. KETTLEWELL: No objection.

8 THE COURT: Right. You don't object to that,
9 Mr. Kiley, do you?

10 MR. KILEY: Oh, I don't.

11 THE COURT: So the case agent is accepted and all
12 of the other witnesses are sequestered and all of you on both
13 sides have to enforce that, because I don't know who these
14 people are.

15 MS. BARCLAY: And just one housekeeping matter,
16 Hannah Beller is a paralegal with our office, who will be
17 sitting at counsel table, if it's all right with Your Honor,
18 to operate the equipment and things like that.

19 THE COURT: Sure. Yes. I actually prefer that.

20 MR. KETTLEWELL: And Your Honor, finally, is there
21 a time this week -- and we can work this out with your clerk,
22 that we can have our person who's going to operate the
23 equipment come in and just make sure that everything is
24 working, so that we're --

25 THE COURT: Just work that out with Maria, there

1 will be plenty of time this week to do that. That reminds me
2 of one more thing.

3 (The Court and the clerk confer.)

4 THE COURT: So you have to decide if you all want
5 to use JERS -- I think she's used JERS before in my
6 courtroom, am I --

7 MS. KAPLAN: Oh, yes.

8 THE COURT: But you should work with each other,
9 because either it goes in with all the evidence, the JERS, or
10 it doesn't go in. And there's both the evidence on it, but
11 there's a list of what is the evidence, kind of like the list
12 that Maria takes of each exhibit with the description, but
13 you all need to sign off on the descriptions if it's going to
14 to go back, because the jurors will see the descriptions. So
15 I don't want to have someone later saying I didn't like that
16 description, I want to give you the chance to address it and
17 have it be satisfactory to everybody.

18 So you can work together on that. Because at the
19 end, what -- the paper exhibits, it would be helpful for me
20 to have two sets, if there are a lot. I take it there are a
21 fair number of documents.

22 At the end, what I would want to give the jurors is
23 a set of the paper exhibits. And if we give them JERS, JERS.
24 And you all -- just pretty standard, you all agree on the
25 record before it goes in that these are the things that are

1 going in. But to the extent you can get JERS done along the
2 way, or the paper exhibits, so we don't -- once they go back,
3 they're going to be like itchy for all of those things, it
4 will be nice to have it all done and take care of it in five
5 minutes, rather than scramble for a while to do it, but I'm
6 sure you'll be able to take care of that.

7 Anything else?

8 MS. KAPLAN: Just a simple question. Where do the
9 witnesses --

10 THE COURT: Over there. Unless there's a specific
11 reason to do it differently, but I don't think there is in
12 this case, so over there. And generally, examining the
13 witness from over there.

14 Any other?

15 MR. KETTLEWELL: Do you have a rule about length of
16 openings, Your Honor?

17 THE COURT: Oh, yes. How long do you all want to
18 open for? Thank you for reminding me about that.

19 MR. KETTLEWELL: Well, I think Mr. Kiley and I have
20 been talking and we've been working together. We would like
21 a collective amount of time of an hour and a half.

22 THE COURT: How long were you planning to do?

23 MS. BARCLAY: 30 minutes.

24 THE COURT: That seems long, an hour and a half. I
25 mean -- so I don't -- in answer to your first question, I

1 don't have a rule across all cases. My typical practice is
2 to ask, first, the lawyers how long do they want, and if it
3 seems reasonable, then generally that's all right. And if it
4 seems too much, then I'll think about it.

5 So 30 minutes seems fine. I don't have a problem
6 with that. What I would typically tell you if you're going
7 to say 30 minutes is, at 25, I'll tell you five, and 29, I'll
8 tell you one, and I'm not going to drop the hammer, but if
9 you tell me 30, I would figure you to be done around 30, you
10 know, like finish up. If you're near the end, I'm not going
11 to make you sit down on the -- when the secondhand hits the
12 30 minutes. But you're really telling me just how long you
13 think it will be.

14 An hour and a half -- and I will do the same for
15 you. I don't think I have a problem with the two of you
16 sharing your time, but an hour and a half, I'm just
17 wondering, it seems kind of long.

18 MR. KETTLEWELL: Well, it's not a negotiation. I
19 understand that.

20 Let me speak to Mr. Kiley.

21 MR. KETTLEWELL: One hour for both of us.

22 THE COURT: You're going to go back and forth,
23 continue it?

24 MR. KETTLEWELL: No, no, no. I'll probably start
25 and open.

1 THE COURT: You might go 20 minutes, he might go
2 40. You might go 40, he might go 20.

3 MR. KETTLEWELL: Correct. And we're working that
4 out, because we don't want repetition and we don't want to
5 bore the jury with other things that are covered.

6 THE COURT: All right. Okay. That kind of sharing
7 is totally fine. And I suppose an hour is reasonable, given
8 that you're taking half and there's two of them. Okay. And
9 I'll do the same reminder at the end.

10 MS. KAPLAN: Can we just talk to you at sidebar for
11 a moment, Your Honor?

12 THE COURT: Sure.

13 (The following discussion held at the bench.)

14 THE COURT: Sealed.

15 (Bench conference sealed at 2:51 p.m.)

16 MS. KAPLAN: So as to Jesse du Bey, if we're going
17 to bring him here, we need to make arrangements because he's
18 in Germany, and as well as his attorney has a paid vacation
19 on July 27th. So if we're going to put him on, we need to
20 put him on next week, and we need to make travel
21 arrangements. I just want to alert you to that.

22 THE COURT: Okay. Nobody is -- nobody has asked
23 me -- like I'm not calling him.

24 MS. KAPLAN: I know. But you are going to rule
25 upon the motion. And perhaps some part of your ruling may

1 make whether we call him important or whether they call him.
2 I don't know if they want him. But we need to alert his
3 attorney to the fact that we need to make travel arrangements
4 for him, if they're calling him or if we're calling him.

5 THE COURT: I see.

6 MR. KILEY: We have been exploring, with his
7 counsel, areas, and we're getting nowhere. So I'm not
8 prepared to tell you that we will or we won't call him yet.
9 We're trying to get information now. We're not -- I would
10 not think that I would be in a position to take him -- for us
11 to take him out of order and do it in the first week.

12 MR. CINTOLO: Right.

13 MR. KILEY: I don't think.

14 THE COURT: What do you want from me?

15 MS. KAPLAN: Do you have any idea when you're going
16 to make a decision? Because that may inform our decision and
17 what we're going to do.

18 THE COURT: Well, I'm thinking about it. I --
19 nothing has changed from what I said in terms of like
20 dismissal. I don't see that I'm likely to dismiss the case.
21 I told you that we were going to go forward, because I
22 thought it was fair for all of you to know that I intend to
23 go forward. I haven't issued an order that denies that
24 relief, but I don't think anybody should expect that I'm
25 dismissing the case because of that motion.

1 And the other two things you asked for were
2 reading -- certain portions of the 302 to the jury.

3 MR. KILEY: Yes.

4 THE COURT: And there was something else.

5 MR. KILEY: The motion proposing an instruction
6 with respect to us.

7 THE COURT: Oh. Right. So you asked about
8 excluding the licensing agreement and the 302. So I'm not
9 saying -- in terms of reading the 302, that seems -- or
10 portions of the 302 that he requested, I'm -- that seems like
11 a -- I haven't come to the place that I think I should do
12 that right now, in part because it just seems like an unusual
13 way to proceed and so -- and to give the jury a part of the
14 302, so I'm not so inclined to do that.

15 In terms of the licensing agreement issue, I meant
16 what I said last time. I will first decide the licensing
17 agreement issue based on the issue, without regard to that.
18 And then, you know, with respect to that, I'll probably hear
19 the evidence, in terms of where we are. And so I don't know
20 how that informs any of you about what you do.

21 MS. KAPLAN: So if they -- if they're going to call
22 him, you need to understand he's in Germany and can't be here
23 the next day. So that's not going to be on the Government.
24 We've made him available. He's been subpoenaed. They can
25 bring him here. We can bring him here.

1 MR. KILEY: We've been working through his
2 attorney, and we have gotten nowhere to this point working
3 through the attorney.

4 MS. BARCLAY: Can we put a deadline on, you know,
5 by the end of the day Wednesday, can you let us know one way
6 or the other so that --

7 THE COURT: About what?

8 MS. BARCLAY: About whether they intend to call
9 him. We don't want to be in the position where they intend
10 to call him, and we haven't made the arrangements to get him
11 here.

12 THE COURT: You know, you can like -- you should
13 certainly tell them, if and when you decide you want to call
14 him, you should tell them, because you know about this issue.
15 And obviously, the sooner you tell them, if you decide, the
16 easier it will be. I don't know what -- Hoopes has teed
17 vacation?

18 MS. BARCLAY: Yes.

19 MR. CINTOLO: It all depends on what Mr. Appel and
20 what Mr. Snow say on direct examination.

21 THE COURT: As to whether you want to call him.

22 MR. CINTOLO: Yes.

23 THE COURT: As.

24 MR. CINTOLO: Yeah, as to whether we call him. If
25 they testify the way we think they'll testify, well, we don't

1 need them. But we're not sure that they will.

2 THE COURT: Okay.

3 MS. KAPLAN: Well, the other issue is I don't
4 believe that Mr. Hoopes is aware that these proceedings are
5 going on, and it would be helpful if we could at least alert
6 him to the fact that he may need to bring his client
7 here.

8 THE COURT: Do you have an objection to that?

9 MR. KETTLEWELL No.

10 THE COURT: Basically, she wants to be able to
11 alert Mr. Hoopes, who is the lawyer for Mr. du Bey of the
12 fact that there is this pending sanction motion and
13 possibility that you wish to have his client appear to hear
14 his testimony.

15 MR. KETTLEWELL: No problem.

16 THE COURT: So the reason that I see it as more
17 more with respect to the publicity any jury issues, not some
18 other reason. I just think that that would be -- that that's
19 sufficient -- that and having the possible effect of having
20 the witnesses and speaking to people in this will -- it's
21 not --

22 MR. KILEY: I am going to want a transcript,
23 because I heard half. But I think I understood everything.
24 I want a transcript of today's proceeding and the prior
25 sealed hearing, please.

1 THE COURT: Okay.

2 MR. CINTOLO: And the lowest, the softest I've ever
3 spoken in my life.

4 MR. KILEY: And truthfully, the press is out there
5 wondering whether we agreed to dismiss the case again.

6 MS. BARCLAY: Yeah, sure.

7 MR. KILEY: Sorry for not speaking to you on that,
8 Your Honor.

9 (Sealed bench conference concluded at 2:58 p.m.)

10 THE COURT: Okay. So anything else from anybody?

11 MR. KETTLEWELL: No, Your Honor.

12 MS. BARCLAY: No, Your Honor.

13 THE COURT: Okay. Then I'll see you Monday. Thank
14 you very much.

15 THE DEPUTY CLERK: All rise, this matter is
16 adjourned.

17 (Court in recess at 3:57 p.m.)

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CERTIFICATE OF OFFICIAL REPORTER

4 I, Rachel M. Lopez, Certified Realtime Reporter, in
5 and for the United States District Court for the District of
6 Massachusetts, do hereby certify that pursuant to Section
7 753, Title 28, United States Code, the foregoing pages
8 are a true and correct transcript of the stenographically
9 reported proceedings held in the above-entitled matter and
10 that the transcript page format is in conformance with the
11 regulations of the Judicial Conference of the United States.

Dated this 19th day of July, 2019.

/s/ RACHEL M. LOPEZ

Rachel M. Lopez, CRR
Official Court Reporter